

107TH CONGRESS  
1ST SESSION

# S. 1296

To provide for the protection of the due process rights of United States citizens (including United States servicemembers) before foreign tribunals, including the International Criminal Court, for the prosecution of war criminals, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

AUGUST 1, 2001

Mr. DODD introduced the following bill; which was read twice and referred to the Committee on Foreign Relations

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## A BILL

To provide for the protection of the due process rights of United States citizens (including United States servicemembers) before foreign tribunals, including the International Criminal Court, for the prosecution of war criminals, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “American Citizens’  
5       Protection and War Criminal Prosecution Act of 2001”.

6       **SEC. 2. FINDINGS.**

7       Congress makes the following findings:

1           (1) Since the Nuremberg and Tokyo Tribunals  
2       were convened following World War II, the United  
3       States has been the world's leading proponent of  
4       international justice. Today, the United States is  
5       pursuing justice for the architects of genocide and  
6       other gross crimes in Cambodia, East Timor, Rwan-  
7       da, Sierra Leone, and the former Yugoslavia.

8           (2) Bringing the perpetrators of genocide, war  
9       crimes, and crimes against humanity to justice is  
10      consistent with United States national interests and  
11      fundamental values.

12          (3) Such crimes cause massive humanitarian  
13      tragedies, and refugee emergencies, that often sig-  
14      nificantly affect United States national interests.

15          (4) The International Criminal Court will be a  
16      permanent court designed to investigate and bring to  
17      justice individuals who commit war crimes, crimes  
18      against humanity, and genocide. The International  
19      Criminal Court will be established under the Rome  
20      Statute, a treaty adopted in Rome on July 17, 1998,  
21      at a United Nations diplomatic conference.

22          (5) On December 31, 2000, the United States  
23      signed the Rome Statute. As of June 28, 2001, 139  
24      countries have signed the treaty and 36 countries  
25      have ratified it. Every member of the European

1 Union and 18 of 19 members of the North Atlantic  
2 Treaty Organization have signed the Rome Statute.

3 (6) United States servicemembers and United  
4 States officials involved in national security affairs  
5 deserve the full protection of the United States Gov-  
6 ernment and should not be the subject of frivolous  
7 or politically motivated prosecutions by the Inter-  
8 national Criminal Court or any other foreign tri-  
9 bunal.

10 (7) United States negotiators succeeded in en-  
11 suring that the Rome Statute contains numerous  
12 safeguards designed to protect United States citi-  
13 zens, including due process rights that former State  
14 Department Legal Adviser Monroe Leigh has called  
15 “more detailed and comprehensive” than those con-  
16 tained in the United States Bill of Rights. The De-  
17 partment of Justice has never objected to the Rome  
18 Statute on constitutional grounds.

19 (8) Under the Rome Statute, the International  
20 Criminal Court must defer to United States jurisdic-  
21 tion in cases involving United States citizens or serv-  
22 ice personnel. The International Criminal Court may  
23 proceed in such cases only if it determines that the  
24 United States has decided not to prosecute the per-  
25 son concerned and that the decision resulted from

1 the unwillingness or inability of the United States  
2 genuinely to prosecute the matter.

3 (9) Upon signing the Rome Statute, President  
4 Clinton stated he did not intend to submit the Rome  
5 Statute in its present form to the Senate for advice  
6 and consent to ratification. The Bush Administra-  
7 tion has also stated that it will not seek the Senate's  
8 advice and consent to ratification of the Rome Stat-  
9 ute.

10 (10) Many issues important to United States  
11 interests are still being negotiated by signatories to  
12 the Rome Statute. Continued United States engage-  
13 ment with the International Criminal Court can help  
14 protect United States interests.

15 **SEC. 3. DEFINITIONS.**

16 In this Act:

17 (1) APPROPRIATE CONGRESSIONAL COMMIT-  
18 TEES.—The term “appropriate congressional com-  
19 mittees” means the Committee on Foreign Relations  
20 of the Senate and the Committee on International  
21 Relations of the House of Representatives.

22 (2) CLASSIFIED NATIONAL SECURITY INFORMA-  
23 TION.—The term “classified national security infor-  
24 mation” means information that is classified or clas-

1       sifiable under Executive Order 12958 or a successor  
2       executive order.

3           (3) INTERNATIONAL CRIMINAL COURT.—The  
4       term “International Criminal Court” means the  
5       court established by the Rome Statute.

6           (4) PARTY TO THE INTERNATIONAL CRIMINAL  
7       COURT.—The term “party to the International  
8       Criminal Court” means a government that has de-  
9       posited an instrument of ratification, acceptance, ap-  
10      proval, or accession to the Rome Statute, and has  
11      not withdrawn from the Rome Statute pursuant to  
12      Article 127 thereof.

13          (5) ROME STATUTE.—The term “Rome Stat-  
14      ute” means the Rome Statute of the International  
15      Criminal Court, adopted by the United Nations Dip-  
16      lomatic Conference of Plenipotentiaries on the Es-  
17      tablishment of an International Criminal Court on  
18      July 17, 1998.

19          (6) UNITED STATES SERVICEMEMBER.—The  
20      term “United States servicemember” means any per-  
21      son that is subject to the provisions of chapter 47  
22      of title 10, United States Code (relating to the Uni-  
23      form Code of Military Justice).

1 **SEC. 4. STATEMENT OF POLICY.**

2 It is the sense of Congress that the United States  
3 should—

4 (1) maintain a policy of fully supporting the  
5 due process rights of all United States citizens be-  
6 fore foreign tribunals, including before the Inter-  
7 national Criminal Court;

8 (2) continue to participate in negotiations of  
9 the Preparatory Commission of the International  
10 Criminal Court and as an observer in the Assembly  
11 of States Parties in order to—

12 (A) ensure that the rules of procedure and  
13 evidence and elements of crimes adopted by the  
14 International Criminal Court conform to United  
15 States standards of due process, are formally  
16 adopted by the Assembly, and fairly applied by  
17 the International Criminal Court's judges and  
18 prosecutors;

19 (B) seek a definition of the crime of ag-  
20 gression under the Rome Statute that is con-  
21 sistent with international law and fully respects  
22 the right of self-defense of the United States  
23 and its allies; and

24 (C) ensure that United States interests are  
25 protected in the negotiations over the remaining

1 elements of the International Criminal Court  
2 regime;

3 (3) provide appropriate diplomatic and legal as-  
4 sistance to United States citizens, especially United  
5 States servicemembers and their dependents, who  
6 face prosecution without full due process in any  
7 forum, including, if applicable, before the Inter-  
8 national Criminal Court; and

9 (4) undertake, in all diplomatic negotiations re-  
10 lated to international legal matters, to ensure that  
11 no United States citizen, especially United States  
12 servicemembers and their dependents, will face frivo-  
13 lous prosecutions or prosecutions without full due  
14 process of law.

15 **SEC. 5. POLICY OF JUDICIAL ASSISTANCE AND PROTEC-**  
16 **TION FOR UNITED STATES CITIZENS AND**  
17 **SERVICEMEMBERS; STUDY AND REPORT.**

18 (a) PROHIBITION.—The United States shall not take  
19 any action to extradite or otherwise make available any  
20 United States citizen or United States servicemember to  
21 the International Criminal Court—

22 (1) if the United States is exercising its right  
23 under the Rome Statute to investigate or prosecute  
24 the crime under title 18, United States Code, or

1 chapter 47 of title 10, United States Code (relating  
2 to the Uniform Code of Military Justice); or

3 (2)(A) if, after any such investigation, no rea-  
4 sonable basis has been found to proceed with a pros-  
5 ecution of such person; or

6 (B) if, after prosecution for such crime, such  
7 person has been acquitted.

8 (b) RIGHT TO INVESTIGATE AND PROSECUTE  
9 UNDER UNITED STATES LAW.—If a United States citizen  
10 or United States servicemember is accused of a crime  
11 under the Rome Statute, the United States shall in all  
12 cases fully exercise its right under the Rome Statute to  
13 investigate and, if appropriate, to prosecute the crime  
14 under title 18, United States Code, or chapter 47 of title  
15 10, United States Code (relating to the Uniform Code of  
16 Military Justice), unless the President determines that it  
17 is not in the national interest to do so.

18 (c) STUDY AND REPORT.—

19 (1) STUDY.—The Attorney General, the Sec-  
20 retary of Defense, and the Secretary of State shall  
21 jointly conduct a study consisting of a review of the  
22 crimes defined under the Rome Statute and consid-  
23 eration of what amendments to title 18, United  
24 States Code, and chapter 47 of title 10, United  
25 States Code (relating to the Uniform Code of Mili-



1        tary Justice) may be necessary to ensure that the  
2        United States can fully exercise its rights under  
3        Part 2 of the Rome Statute.

4            (2) REPORT.—Not later than 180 days after  
5        the date of enactment of this Act, the Attorney Gen-  
6        eral, the Secretary of Defense, and the Secretary of  
7        State shall jointly submit to the appropriate congres-  
8        sional committees a report setting forth the findings  
9        of the study conducted under paragraph (1), includ-  
10       ing any recommendations for the enactment of legis-  
11       lation making the amendments described in that  
12       paragraph.

13        (d) PROTECTIONS FOR UNITED STATES DEFEND-  
14       ANTS BEFORE THE INTERNATIONAL CRIMINAL COURT.—  
15       If a case involving a United States citizen or United States  
16       servicemember is found admissible by the International  
17       Criminal Court (within the meaning of Article 17 of the  
18       Rome Statute), then the President shall—

19            (1) use all appropriate diplomatic and legal re-  
20        sources to ensure that such person receives due  
21        process (including, in the case of a person entitled  
22        to assistance under section 1037 of title 10, rep-  
23        resentation and other assistance in the manner pro-  
24        vided in that section); and

1           (2) provide for the defendant whatever excul-  
2           patory evidence may be available.

3 **SEC. 6. REPORTING REQUIREMENT.**

4           (a) REQUIREMENT.—Not later than one year after  
5 the date of enactment of this Act, the President shall sub-  
6 mit a report to the appropriate congressional  
7 committees—

8           (1) comparing the due process protections af-  
9           forded under the Rome Statute to those due process  
10          protections afforded United States servicemembers  
11          and their dependents under Status of Forces Agree-  
12          ments, temporary Status of Forces Agreements,  
13          temporary Status of Mission Agreements and Let-  
14          ters of Assist in effect between the United States  
15          and foreign nations or international organizations as  
16          of the date of the report; and

17          (2) comparing the due process protections af-  
18          forded under the Rome Statute to those due process  
19          protections afforded United States citizens under bi-  
20          lateral extradition treaties to which the United  
21          States is a party, or multilateral treaties to which  
22          the United States is a party and which contain a  
23          provision authorizing extradition.

24          (b) ELEMENTS OF THE REPORT.—The report re-  
25          quired by subsection (a) shall describe, in particular, the

1 extent to which United States citizens or United States  
2 servicemembers accused of crimes overseas currently are  
3 provided—

- 4 (1) the right to a jury trial;
- 5 (2) the presumption of innocence;
- 6 (3) the privilege against compelled self-incrimi-  
7 nation;
- 8 (4) the right to confront witnesses;
- 9 (5) the protection against double jeopardy;
- 10 (6) the freedom from unreasonable searches  
11 and seizures;
- 12 (7) the right to be present at trial;
- 13 (8) the right to effective assistance of counsel;
- 14 and
- 15 (9) the exclusion of unlawfully obtained evi-  
16 dence.

17 **SEC. 7. POLICY OF ASSISTANCE FOR THE PROSECUTION OF**  
18 **WAR CRIMINALS.**

19 (a) SUPPORT AND ASSISTANCE AUTHORIZED.—Not-  
20 withstanding any other law, while the United States is not  
21 a party to the Rome Statute, the United States may pro-  
22 vide support and assistance, as appropriate, on a case-by-  
23 case basis to the International Criminal Court for the  
24 prosecution of accused war criminals, particularly those  
25 accused of crimes against United States servicemembers,

1 United States citizens, or citizens of countries friendly to,  
2 or allied with, the United States when the President deter-  
3 mines that doing so would serve important United States  
4 interests.

5 (b) SUPPORT AND ASSISTANCE DEFINED.—In this  
6 section, the term “support and assistance” includes finan-  
7 cial support, compliance with extradition requests, provi-  
8 sion of appropriate intelligence information, legal assist-  
9 ance, and such other assistance that is ordinarily provided  
10 under treaties and executive agreements for mutual legal  
11 assistance.

12 **SEC. 8. PROHIBITION ON DIRECT OR INDIRECT TRANSFER**  
13 **OF CERTAIN CLASSIFIED NATIONAL SECU-**  
14 **RITY INFORMATION TO THE INTERNATIONAL**  
15 **CRIMINAL COURT.**

16 (a) DIRECT TRANSFER.—Except as provided in sec-  
17 tion 7, and not later than the date of entry into force of  
18 the Rome Statute, the President shall ensure that appro-  
19 priate procedures are in place to prevent the transfer of  
20 classified national security information to the Inter-  
21 national Criminal Court.

22 (b) INDIRECT TRANSFER.—Except as provided in  
23 section 7, and not later than the date of entry into force  
24 of the Rome Statute, the President shall ensure that ap-  
25 propriate procedures are in place to prevent the transfer

1 of classified national security information relevant to mat-  
2 ters under consideration by the International Criminal  
3 Court to the United Nations and to the government of  
4 any country that is a party to the International Criminal  
5 Court unless the United Nations or that government, as  
6 the case may be, has provided written assurances that  
7 such information will not be made available to the Inter-  
8 national Criminal Court.

9 **SEC. 9. ALLIANCE COMMAND ARRANGEMENTS.**

10 (a) REPORT ON ALLIANCE COMMAND ARRANGE-  
11 MENTS.—Not later than 6 months after the date of the  
12 enactment of this Act, the President shall transmit to the  
13 appropriate congressional committees a report with re-  
14 spect to each military alliance to which the United States  
15 is party—

16 (1) describing the degree to which members of  
17 the Armed Forces of the United States may, in the  
18 context of military operations undertaken by or pur-  
19 suant to that alliance, be placed under the command  
20 or operational control of foreign military officers  
21 subject to the jurisdiction of the International Crimi-  
22 nal Court because they are nationals of a party to  
23 the International Criminal Court; and

24 (2) evaluating the degree to which members of  
25 the Armed Forces of the United States engaged in

1 military operations undertaken by or pursuant to  
 2 that alliance may be exposed to greater risks as a  
 3 result of being placed under the command or oper-  
 4 ational control of foreign military officers subject to  
 5 the jurisdiction of the International Criminal Court.

6 (b) DESCRIPTION OF MEASURES TO ACHIEVE EN-  
 7 HANCED PROTECTION FOR MEMBERS OF THE ARMED  
 8 FORCES OF THE UNITED STATES.—Not later than one  
 9 year after the date of the enactment of this Act, the Presi-  
 10 dent shall transmit to the appropriate congressional com-  
 11 mittees a description of modifications to command and  
 12 operational control arrangements within military alliances  
 13 to which the United States is a party that could be made  
 14 in order to reduce any risks to members of the Armed  
 15 Forces of the United States identified pursuant to sub-  
 16 section (a)(2).

17 (c) SUBMISSION IN CLASSIFIED FORM.—The report  
 18 under subsection (a), and the description of measures  
 19 under subsection (b), or appropriate parts thereof, may  
 20 be submitted in classified form.

21 **SEC. 10. CERTIFICATION PRIOR TO SUBMISSION OF ROME**  
 22 **STATUTE TO THE SENATE AS A TREATY.**

23 Prior to submission of the Rome Statute to the Sen-  
 24 ate for its advice and consent to ratification, the President  
 25 should certify that the International Criminal Court has

- 1 established a demonstrated record of fair and impartial
- 2 prosecution of genocide, war crimes, and crimes against
- 3 humanity.

